IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 3420/97 TO 3449/97
SPECIAL CIVIL APPLICATION NO.3359/97 TO 3378/97
SPECIAL CIVIL APPLICATION NO. 3337/97 AND 3386/97
SPECIAL CIVIL APPLICATION NOS. 3342/97 TO 3344/97
SPECIAL CIVIL APPLICATION NOS. 3353/97, 3393/97, 3410/97, 3476/97, 3518/97, 3525/97, 3562/97, 3880/97, 4601/97 AND 4604/97.

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

No. 1 and 2 Yes Nos. 3 to 5 No

PAMAN BHOBHRAJMAL NAVLANI

Versus

DEPUTY MUNICIPAL COMMISSIONER (V)

Appearance:

1. Special Civil Application No. 3420 of 1997
to 3449 of 1997
Special Civil Application No. 3359/97 to 3378/97

MR SB VAKIL for Petitioner
MR G.N. DESAI WITH MR PRANAV G DESAI
for Respondent No. 1 and 2
MR PRASHANT G. DESAI, GOVERNMENT PLEADER
for respondent No.3

2. Special Civil Application No 3337 of 1997
to 3386/97

MR PB MAJMUDAR for Petitioner
MR G.N. DESAI WITH MR PRANAV G. DESAI,for Respondent Nos. 1 and 2
MR PRASHANT G. DESAI, GOVERNMENT PLEADER for respondent No.3

3. Special Civil Application No. 3525 of 1997

MR. M.B. PARIKH for the petitioner
MR. G.N. DESAI WITH PRANAV DESAI for respondent Nos. 1
MR. PRASHANT G. DESAI, GOVERNMENT PLEADER for respondent No. 2

4. Special Civil Application Nos. 3342/97, 3343/97, 3344/97, 3353/97, 3393/97, 3410/97, 3476/97, 3518/97, 3525/97, 3562/97, 3880/97, 4601/97 and 4604/97.

Mr. B.S. Patel, Advocate for the petitioners
Mr. G.N.Desai with Mr. Pranav G.Desai for respondent Nos. 1 and 2.
Mr. Prashant G. Desai, Government Pleader for respondent No.2.

CORAM : MR.JUSTICE R.K.ABICHANDANI
Date of decision: 07/08/97

ORAL JUDGEMENT

This group of petitions raise common points and they have been heard together at the instance of both the sides and are being disposed of by this common judgement and order.

2. The petitioners have challenged notices given to them by the respondent Vadodara Municipal Corporation by which they are required to remove the encroachments made by them within 15 days of the receipt of the notice, failing which the Corporation informed them that it would remove the encroachments at their expense. These notices narrate the fact that the temporary licence of the petitioners in respect of the placement of cabin/larry/hand-cart had expired, which dates fall in most cases in December, 1988 and March, 1989 and that

they were liable to be removed in view of the Scheme framed pursuant to the directions of Hon'ble the Supreme Court. The notices were given in April, 1997.

3. According to the petitioners, they were given small plots admeasuring about 5' x 5' in the Laheripura area of Ward No.1 of the Municipal Corporation (in most cases), Near Vittal Mandir, M.G. Road, Near Julelal Temple etc. and they had constructed wooden cabins for their business. According to the petitioners most of them are displaced persons who on partition, had come to Vadodara and they were given these plots by charging the ground rent varying from one anna to 2 annas per square foot. In 1953 when this rent was increased, they had objected but through intervention of some persons, rent at the rate of 3 annas per square foot was agreed to be paid up to May, 1955.

4. It appears that from 9th March, 1953 the Collector, Baroda had sent a communication (Annexure-`C' in Spl. C.A. No. 3359 of 1997) to the President of the Hawkers' Association, Baroda to the effect that their request for space near Mahatma Gandhi statue for about 20 `larries' was accepted. Further more, in order to accommodate the refugees, it was decided to increase the area of plot near Darbar Hotel by reducing the width of the road by 25 feet so that they could accommodate 48 persons there. The site on the Mandvi Fani Gate road adjoining to the Nazarbaug wall road was also earmarked for cabins/larries of about 54 persons. It was in terms stated that looking to the interests of the city as a whole and especially of the middle classes, the Sursagar area cannot be given for shops and was to be kept open permanently. It was stated that the decisions will have to be implemented by 15th March, 1953 failing which force will be used in clearing the site. On 19th March, 1953 a communication was sent by the then Baroda Municipality to the Hawkers' Association, in which it was instructed that the present licence holders were to be distributed the plots ear-marked and the arrangement was to take place from 1st April, 1953. It was in terms stated that if no action was taken, the present licence holders shall have to be removed on 1.4.1953. On 21st April, 1953, a notice was given that wooden cabins could be prepared only after submitting a rough plan and getting it approved from the Municipality, failing which their plots in Padmavati Chaugan were liable to be cancelled.

5. It appears that a suit being Civil Suit No. 1073/58 was filed in a representative capacity in the Court of the learned Civil Judge (S.D) at Baroda for a

declaration that the Municipality had no right or jurisdiction to invoke the provisions of the Municipal Borough Act as the entire suit plot in Lehripura admeasuring 500 ft. had not vested in the Municipality and that it had no right to recover any lease money or ground rent or the possession of the portions of land from the plaintiffs. That suit with two other cognate suits was dismissed and regular Civil Appeals Nos. 7, 8 and 9/92 were preferred before the Extra Assistant Judge, Baroda. In that appeal, it was held that the plaintiffs were estopped from denying the title of the Municipality. The appellate Court observed that it could not be said that the appellants acting upon the licence had executed work of a permanent character and that the fact that the appellants were bound to apply for renewal in every April, showed that they were agreed to evict in the end of March, if the application for renewal of the licence was rejected in the month of April. It was held that the appellant had failed to prove that their case fell under Section 60(a)(b) of the Indian Easement Act or that their licence was not revocable. The appellate Court however held that the appellants were tenants and therefore the Municipality could not take law into its own hand and evict them by summary mode of eviction. The Municipality (the Corporation was constituted on 1.4.1966 from when the BPMC Act applied) was therefore restrained from evicting the appellant except by due process of law. The rest of the reliefs were refused and the order of the trial Court dismissing the suit as regards the rest of the reliefs was confirmed. That decision was given on 31st August, 1963. According to the petitioners, the Municipal authorities refused to recognise them as tenants in respect of the portions occupied by them and refused to accept the rent (paragraph 4.4 of Special Civil Application No. 3359/97 etc.). It appears that the petitioners were thereafter given notices in October, 1966 under the provisions of Section 437A(2) of the Bombay Provincial Municipal Corporation Act, which became applicable because of the Municipal Corporation of Baroda, having been constituted from1.4.1966. In that notice (copy at Annexure 50 of the affidavit-in-reply of the Corporation), it was stated that an appeal was filed against the appellate decision dated 31st Aug. 1963. It was stated that the petitioners were licence holders. However, if they considered themselves as tenants their term having expired it was intended to evict them under the provisions of Section 437A and accordingly, these notices were given to show cause within 15 days as to why the order of eviction should not be made. The petitioners were informed that the hearing was fixed on 7th January, 1967. The contentions raised by the

petitioners in their reply to the show cause notice were pressed by them before the concerned authority during the hearing. On 31st January, 1967 the petitioners were served with an order dated 20.1.1967 requiring them to vacate the portion within one month of the service of the order. The fact that such order was made, was admitted at the hearing and has been mentioned in paragraph 4.6 of Special Civil Application No. 3359/97, and in other petitions. Thereafter, the petitioners preferred Special Civil Application No.1124 of 1966 challenging the Constitutionality of the provisions of Section 437A and the orders made under Section 437A(1) on the ground that they were not supported by reasons. The Division Bench of this Court, hearing that petition alongwith some other cognate matters, by its decision reported in 11 G.L.R pg.1 allowed the petition, holding that the provisions of Section 437A were unconstitutional and further that the orders of eviction made under Section 437A(1) contained in the notices issued to the petitioners did not show ex-facie the reasons which led to their making and therefore, the orders were liable to be set aside. Against that decision, the matter was carried to the Supreme Court and the Supreme Court by its decision in Ahmedabad Municipality Vs. Ramanlal - AIR 1975 S.C 1187, reversed the decision of the High Court and upheld the constitutionality of Section 437A(1). As regards the ground on which the orders were set aside - namely that they did not disclose the reasons, the Supreme Court in paragraph 27 of the judgement, held: "The orders which were passed gave reasons. The orders were not served. That should not happen. That indicates inefficiency. There is no infirmity in the orders. The authorities should serve orders giving reasons for making the order."

6. According to the petitioners, a circular was issued by the Government on 7th June, 1976 informing all the Municipal authorities that wherever displaced Sindi persons had constructed cabins and were paying rent to the local authorities, whenever an occasion arose due to inevitable circumstances to remove their cabins that should be done after providing them alternative accommodation.

7. The Associations of Larriwalas, Gallawallas and Patharnawallas and such individuals from Ahmedabad, Baroda and Surat who had put up cabins or stalls were having hand carts with four wheels or were squatting for the sale of their goods on public streets and footpaths feeling aggrieved by the action being taken under Section 231 of the BPMC Act challenged the provisions of Sections 230 and 231 on the ground that they were violative of

their fundamental right to business and therefore these Corporations had no authority to remove their larries or gallas or goods and should be restrained from doing so. These petitions including those filed by larry/galla/patharnawallas of the city of Baroda came to be decided by this Court and a Division Bench by its decision in Gulam Ali Gulam Nabi Sheikh Vs. Municipal Commissioner reported in 1986 G.L.H 616 held that in view of the decisions of the Supreme Court in Bombay Hawkers' Union and ors. (1985) 3 S.C.C 528 and Olga Tellis (1985) 3 SCC 545, these hawkers have no fundamental or legal right to occupy parts of public streets for doing their business and that Section 231 of the said Act was not ultra vires Article 14, 19 or 21 of the Constitution. It was held that if the Corporation failed to discharge their obligatory duty of removing the encroachments, a citizen could approach the Court for compelling the Corporation to discharge its duty, but inaction on the part of the Corporation can never confer a right to occupy the parts of public streets. In that petition the Corporations including the Baroda Municipal Corporation were directed to formulate a scheme as modified and approved by the Supreme Court in Bombay Hawkers' Union Vs. Bombay Municipal Corporation (1985) 3 S.C.C 528. The matter was carried to the Supreme Court against the Municipal Corporation of Baroda and the Supreme Court by its order dated 2nd May, 1986 disposed of the group of appeals and writ petitions (W.P. 657 of 1986) in the following terms:-

"1. The petitioners/Appellants undertake to this Court that they shall remove their hand-carts and/or gallas, cabins etc. on or before December 31, 1986. However, this undertaking by the appellants/petitioners will be subject to clause (2) below. Such undertakings should mention the exact places of their present trading. The undertakings to be filed by July, 1986.

2. The appellants/petitioners, however, will be at liberty to adopt appropriate proceedings in respect of locations of the area or the places in the trading zones where the appellants/petitioners and other hawkers will be permitted to carry on their trade in the Final scheme.

3. The Municipal Corporation of Baroda shall give an opportunity to the appellants/petitioners to make their representations and will take them into consideration when it fixes hawking and

non-hawking zones, the final scheme.

4. The Municipal Corporation, Baroda, should fix such zones expeditiously and in any case on or before December 15, 1986.

5. The Interim Scheme as approved by the Surat cases in clauses (5) of the Surat matters may be implemented subject to the modification that clause (4) of the Baroda interim scheme shall be deleted.

There is no order as to costs."

8. As per this order, notices were issued inviting representations in the matter of fixing of the trade zones and a retired District Judge (Mr. M.K. Desai) who was entrusted the task of preparing the scheme, after hearing the persons interested pursuant to the notices issued and considering the material on record, prepared a report for hawking and non-hawking zone for the city of Baroda. In that report it was observed that in the city of Baroda the hawkers do their business in Patharnas, cabins, stationary hand carts etc. and that on the main roads the problem mainly was about hawkers selling their goods in cabins, patharnas and stationary hand larries (page 5 of the scheme). The final scheme adopted by the Corporation was challenged in Special Civil Application No. 3138/88 and other cognate matters and a Division Bench of this Court by its decision dated 5th August, 1988 rejected both the petitions summarily holding that there was no serious flaw in the scheme prepared by the Retired District Judge Mr.M.K. Desai and adopted by the Baroda Municipal Corporation.

9. Thereafter, on the plea that the provisions in the Scheme were not worked out appropriately and that the respondents were not provided suitable places within the hawking zones, the hawkers of Baroda had approached the Civil Court and obtained an order of injunction, which fact was brought to the notice of the Supreme Court in S.L.P No. 546/89 and Hon'ble Supreme Court by its order dated 3.5.89 dismissed the suit and vacated all the inter-locutory orders made therein by the Baroda Court making the following observations:-

"We are of the view that it was an attempt to thwart the scheme by approaching the Civil Court. It is an abuse of process of the Court and gives rise to a situation where contempt action should lie. We, however, do not propose to take such

action, but consider it very appropriate and in the interest of justice to direct dismissal of the suit itself. By this order of ours, the said suit being No. 1761 of 1989 in the Court of 6th Joint Civil Judge, Sr. Division, Vadodara shall stand dismissed and all interlocutory orders made therein shall stand dismissed. We however, would like to record the assurance given to us by counsel for the Municipal Corporation that within a week from the date of application, appropriate hawking licences in the hawking zones shall be issued by the Municipal Corporation upon applications being made for such licences."

10. According to the petitioners, in October, 1988 the Corporation launched a drive for removing all larries, gallas and cabins which were on the roads. The case of the petitioners is that they are cabin holders and have been paying regular rents to the Corporation in respect of their wooden cabins and therefore, they cannot be compared with `larry galla' owners. The petitioners who are cabin owners were being made the target of the drive to remove encroachments from the roads and therefore, 48 cabin holders filed Special Civil Application No. 7396/88 challenging the impending action of the Corporation of removing their cabins from opposite Khajuria Mazjid, Laheripura etc. That petition came up for hearing before Hon'ble Mr.Justice N.N.Mathur and by the judgement and order dated 22.2.96, it was held that the petitioners had approached the Court only on apprehension and therefore, the petition was not maintainable. While rejecting the petition, it was directed that if the Corporation takes any action for eviction of the petitioners in accordance with law, it shall not be enforced for a period of 15 days. It was contended in that petition that the petitioners could not be summarily evicted under Section 231 of the said Act since they were having the cabins for over a long period.

11 The learned Counsel Mr. S.B. Vakil, Mr. P.B.Majumdar, Mr. B.S.Patel and Mr. M.B.Parikh have addressed the Court in respect of their respective matters. The contentions raised in the lead group argued by Mr. S.B.Vakil have been adopted by the other learned Counsel who also made some additional submissions.

12. It was contended on behalf of the petitioners that the impugned notices did not mention that it was issued under the provisions of Section 231 of the said

Act. These notices only referred to the decisions of the Courts including the decisions of the Supreme Court. it was submitted that the petitioners were not parties to the matters in which the Supreme court gave directions in connection with the formulation of the scheme by the Baroda Municipal Corporation and therefore, the scheme was not binding on the petitioners. It was submitted that there was total non-application of mind in issuing the impugned notices because appropriate deletions were not made and at some places the blanks were not even filled-in. The alternatives were mentioned without indicating applicable words. Further more, these notices were given for enforcement of hawking and non-hawking zone scheme and could not affect the petitioners who were not parties to the matters in which the judgements mentioned therein were rendered. It was submitted that the decisions of the Supreme Court mentioned in the notice was not a judgement in rem and it could only bind the persons who were parties before the Court. Even amongst those parties these decisions would bind only with reference to the subject matter of those petitions. It was further argued that the petitioners who were parties in the matter before the Supreme Court were persons who were having hand carts and hand larries and they were not cabin holders like the petitioners. It was submitted that the petitioners who are cabin holders stood on a different footing and could not be equated with larrywallas or hand-cart owners who would creating obstructions on the public road. It was then contended that there was a decree already passed in a representative suit, declaring that the petitioners were allotted the plot as tenants and the Municipality (as it then was) was not entitled to evict them by summary mode of eviction and except by due process of law. It was contended that the petitioners were issued receipts for the rents paid by them and they were not trespassers. Since they occupied the portions with the permission of the Municipality, there was no question of evicting them under the provisions of Section 231 of the Act. It was further submitted that Section 231 cannot be invoked where the place is occupied with the permission of the Commissioner. It was also argued that cabins were affixed with the land, they were not things which can be said to have been placed or deposited on a public place as envisaged by Section 230 of the Act. It was submitted that clause (a) and (b) of Section 231 were not at all attracted in the instant case. It was argued that notice was required by virtue of the decision of the Court (N.N.Mathur,J.) in Special Civil Application No. 7396/88, in which it was directed that if the Corporation takes a decision, the petitioners will not be

dis-possessed for 15 days. Therefore, according to the learned Counsel, the provisions of Section 231 which could apply where notice was not required to be given, could not be invoked. It was then contended that hearing was absolutely necessary before taking any action even under Section 231 of the said Act. It was contended that no order could be made to throw the petitioners out without giving them hearing. If hearings were given, they could have contended that they were given permission to occupy these places and put up other defences. Reliance was placed on the decisions of the Court in Hasmukhbhai Dhanjibhai Zaveri Vs. R. Parthasarthy reported in 12 GLR 128, J.G. Vyas Vs. Vijay Housing Devt. reported in 35(1) GLR 377 and Dalwadi Laljibhai Gatorbhai Vs. State of Gujarat reported in 1995 G.L.H. 1 in support of his contention that hearing was required to be given before removing the cabins of the petitioners. It was however, submitted that the impugned notice was not based on Section 230 or 231 and had proceeded on the basis of the scheme framed by the Baroda Municipal Corporation pursuant to the orders of the Supreme Court. It was also contended that affidavits cannot spell out what was not there in the notice and since it was not mentioned in the impugned notices that they were issued under the provisions of Section 231(1) of the Act, the fact that the Corporation now states so in the affidavit, cannot make them as notices issued under the provisions of Section 231 of the Act. Reliance was placed in support of this contention on the decision of the Supreme Court in Mohinder Singh Vs. Chief Election Commissioner reported in AIR 1978 S.C 851. It was further argued that the alternative site were offered only after the filing of these petitions and that the conditions incorporated in the offer would show that they were not real alternative sites. It was also submitted that the alternative sites were in a place where the petitioners will not be able to do their business peacefully and there were boot-leggers and other anti-social elements around, which would not permit the petitioners to do their business peacefully. It was contended that in some cases (Special Civil Application No. 3360/97) transfers were allowed and accordingly cabins were transferred to other names. It was also submitted that in the case of the petitioner of Special Civil Application No. 3448/97, an interim relief was granted by the Civil Court in Regular Civil Suit No.799/85 by order dated 30.9.97 was operated. A certified copy of that order is placed on record. In that order, it is observed that it was not prima-facie shown that the Municipal Corporation had accepted the plaintiff as a tenant and that mere acceptance of the

amount would not make the plaintiff as tenant. It was also observed that there was a dispute as to whether the plaintiff was a licensee or a tenant. However, since the plaintiff was in occupation, interim relief was granted.

13. Mr. P.B. Majumdar, the learned Counsel appearing for the petitioners of the petitions argued by him, contended that there was a registration certificate issued in the petitioners' favour under the provisions of the Shops and Establishments Act, that they were paying professional tax and that their possession was lawful and they cannot be ranked as trespassers. It was also submitted that Sindhis who had settled as refugees in Baroda were to be treated as special class by virtue of the Government policy and they could not be shifted without an alternative accommodation being given to them. It was submitted that the only procedure which could be adopted by the Corporation was either to proceed under Section 437A or to file a suit and when Section 437A was deleted, the Corporation could proceed only under the provisions of the Public Premises (Eviction of Unauthorised Occupants) Act. It was also submitted that the petitioners were not heard while framing the scheme demarcating trade zones. It was submitted that the Corporation could not have legally proceeded against the petitioners under the provisions of Section 230 of the Act.

14 In the group argued by Mr. B.S. Patel, while adopting the contentions raised in the group argued by Mr. S.B.Vakil, Mr. Patel further contended that the status of the petitioners as cabin holders was accepted and the petitioners could not be grouped with larri-galla owners. He submitted that the word `hawker' would mean that a person should travel from one place to other for selling his goods. He referred to the definition of `hawker' from Law Lexicon by Venkitaramaiha and Webster for bringing home the point that the scheme on the basis of which the petitioners were sought to be evicted could not be applied to the petitioners who were having cabins in these non-hawking zones. He submitted that in the report of Mr.M.K.Desai, the place where the petitioners were having the cabins was described as a shopping centre and therefore, according to him the petitioners could not be removed. It was submitted that objections were not invited from the cabin holders, but they were invited only from larriwallas. He also submitted that no hawking licence was required to be taken by the petitioner cabin holders under Section 384 of the said Act. It was further contended that the impugned notice did not mention that the presence of the petitioners in the

public place was hazardous . The ingredients for the exercise of powers under Section 231 were not mentioned in the impugned notice. He submitted that in Special Civil Application No. 3343/97 and 3344/97 there was pursis given by the Corporation in the suits declaring that they would not remove the plaintiffs without obtaining an order of the Court or from an authority in accordance with law. It was submitted that on the basis of that pursis, the Civil Court had passed a decree in which it was ordered that the plaintiffs of that suit will not be removed except by following the procedure prescribed by law. It was submitted that the roads vested in the Corporation and therefore, the petitioners were on the land belonging to the Corporation. According to the learned Counsel, once the portion was given to the petitioners, it ceased to be part of the road. It was submitted that if the Corporation wanted vacant possession in a case where decree was obtained, it can do so only by executing a decree. It was further argued that Section 437A was repealed in view of the provisions of the Gujarat Public Premises (Eviction of Unauthorised Occupants) Act, 1972 and therefore, the Municipal Corporation could remove the petitioners only by following the provisions of that Act. According to the learned Counsel, the petitioners were tenants and right had accrued to them by virtue of long user of more than 30 years and because of the fact that their lease was not terminated. It was also contended that hearing was required to be given to the petitioners before they could be removed and reliance was placed in support of this contention also on the decision of this Court in Nehru Marg Cabin Association Vs. Modasa Nagar Palika & Ors. reported in 29 (1) G.L.R 441 in addition to those already cited by the counsel in the other group. It was also contended that in some cases registration fee of Rs. 7,200/- was taken and the cabins were transferred by taking such fee (Special Civil Application No. 3344/97). In one case, a sum of Rs. 10,500/- was taken for effecting such transfer. It was submitted that there was a policy of allowing such transfers. It was also submitted that these cabins of the petitioners were intended to be permanent. It was also submitted that if no cabin in non-hawking zone is permitted, then even other shops in those zone cannot be allowed. As regards Special Civil Application No. 4601/97, it was submitted that 15 petitioners of that petition were forcibly shifted when they were not given interim relief in the suit and they have been offered alternative sites only after forcibly shifting them. As regards Special Civil Application No. 4601/97, it was submitted that the petitioner therein did not claim to be a tenant but he

was having a tea-larri and had applied for appropriate place by his application dated 22.10.88 under the scheme.

15. The learned Counsel Mr. M.B.Parikh adopted the contentions raised by the other Counsel and submitted that the petitioner was not a hawker and could not be removed without following the provisions of the Gujarat Public Premises (Eviction of Unauthorised Occupants) Act.

16. The learned Counsel appearing for the respondent Corporation submitted that the scheme was approved by a Division Bench of this Court and the Supreme Court and as per that scheme all the cabins, gallas, hand-carts etc. which were in the non-hawking zones were required to be removed. It was submitted that it was not necessary to give any show cause notice before such removal. It was stated that all these cabins were on public streets which were listed in the Non-Hawking zone and in each case, the earlier licence had ended as far back as in the years 1988 and 1989. It was submitted that there was no question of any lease having been given to any of these petitioners and they were all pure and simple licence holders. It was further contended that the cabins were also the subject matter of the scheme as can be seen from the scheme itself. It was further submitted that the notices were given even though they were not necessary to be given and the Commissioner was only exercising his powers under the provisions of Section 231 of the Act for removing the cabin structures which were placed on the street. Since there was no valid licence operating in favour of any of the petitioners, the continuance of such structure was clearly contrary to the provisions of the Act. It was submitted that there was no legal right of the petitioners which could entitle them to keep the cabins on the public streets and therefore, there was no necessity of giving any show cause notice for hearing them. The learned Counsel referred to the provisions of the Act and contended that the public street vested in the Corporation for the limited purpose of maintaining it as a public street and therefore, there was no question of the petitioners being allowed to continue their business at these places, which are covered by the scheme in the non-hawking zone. It was submitted that the judgement of the appellate Court relied upon by the petitioners did not give them any status of being permanent tenants and they had no right to continue after their licence was ended. It was submitted that after the scheme which was sanctioned by the highest Court, there was no question of any contrary interim order or a Civil Court decision operating, so as to entitle any of the

petitioners to continue at these places. It was submitted that non-mention of the provisions of Section 231 was of no consequence because the Commissioner did have power under that provision which was being exercised under the impugned notices.

17. There is no dispute about the fact that the Scheme of Hawking zone and Non-Hawking zone has been framed by the Baroda Municipal Corporation pursuant to the orders of the Supreme Court made on 2.5.86 in writ petition No. 657/86 and other cognate matters. From that order is reproduced hereinabove, it is clear that an undertaking was required to be given before the Court for removal of hand-carts, gallas, cabins etc. That was made subject to clause 2 of the order. Under clause 2 liberty to adopt appropriate proceedings was granted in respect of locations of areas or places in the trading zones, where the petitioners and other hawkers were to be permitted to carry on their business or trade in the final scheme. An opportunity was required to be given to the petitioners to make their representations while fixing the Hawking and Non-Hawking zones in the final scheme and the Municipal Corporation of Baroda was directed to fix such zones expeditiously. Accordingly, the scheme was framed and was approved by a Division bench of this Court (A.M.Ahmadi and P.M.Chauhan,JJ.) on 5th August, 1988. The Hon'ble Supreme Court when pointed out that a suit was being proceeded with in Baroda Court, in SLP 5465/89 on 3.5.89 vacated the order of interim injunction granted by the Civil Court and dismissed the suit observing that approaching the Civil Court was an attempt to thwart the scheme and amounted to abuse of the process of the Court. It is therefore clear that the Scheme which has been framed as per the directions of Hon'ble the Supreme Court would prevail over any inconsistent order that may be passed by any inferior Court. It is clear that the decision of the Supreme Court directing the scheme to be framed was not confined to some individual hawkers only, but it was a direction on the Municipal Corporation to frame a scheme for the whole city demarcating the Hawking and Non-hawking zones, which was required to be implemented. The decision of the Supreme Court giving such directions was therefore, clearly a decision in rem binding on all hawkers of the city and the petitioners who were not party before the Supreme Court cannot claim to be exempt from the Scheme on the ground that the Scheme would bind only the parties which were before the Supreme Court. Admittedly, as stated in the scheme in the report which is incorporated therein, notices were issued inviting suggestions, representations from the interested parties. Notice

dated 22nd March, 1987 was issued in Newspapers inviting the general public and hawkers to give their statements, suggestions and objections for formulation of the hawking and non-hawking zones. All these petitioners had therefore, ample opportunity to put forth their case before Mr. M.K. Desai, who was appointed to prepare the scheme. In the report, there is a clear reference to the fact that in the city of Baroda, the hawkers do their business in roving hand cart, cabins, stationary hand-carts etc. The Scheme was intended to cover not only hand larries, which were moving or stationary, but also cabins. In the judgement of this High Court in Gulam Ali's case (supra) in which the direction was initially given to frame the Scheme the word `hawker' was used to collectively refer larriwallas, gallawalas (i.e. cabin and stall holders) as stated in para 2 of the judgement. The word cabins occurs even in the decision of the Supreme Court in which directions were given to frame the scheme. There is therefore absolutely no substance in the contention canvassed on behalf of the petitioners that the scheme was not intended to cover persons who were not parties before the Supreme Court or persons who were having cabins at these places. It cannot be said that the scheme was confined only to hand-larries and was not applicable to cabins at these places.

18. In view of the fact that the Scheme was framed under the directions of the Supreme Court, it is clear that any decree or order of a Civil Court including an injunction which runs contrary to the Scheme sanctioned by the Supreme Court would be of no avail to the petitioners who claim the benefit of such Court order. Apart from this, it would be clear from the orders of the subordinate Courts on which reliance is placed that the Corporations power to take action in accordance with law is not at all affected. In the appellate decision of the Baroda Court (Regular Civil Appeal Nos. 7, 8 and 9/62), it was declared by the Court on 31st August, 1963 that the Municipality could not evict those plaintiffs summarily and it was restrained from evicting them except by due process of law. After that decision, the said Act became from 1st April, 1966 applicable because the Baroda Municipal Corporation was constituted from that date and the provisions of Section 231 became applicable under which the Commissioner could have exercised his power. Undisputedly, in all these cases the licences stood terminated on the dates shown in the notices. The petitioners did not have any permanent right to continue in the plots which were given to them for hawking. The record shows that they were described by the Corporation

as licensees. The licence fee even if it was described as rent in the receipt, would not change the nature of the licence. Under the provisions of Section 60 of the Indian Easement Act, 1882, a licence may be revoked by the grantor unless it was coupled with a transfer of property and such transfer is in force or acting upon the licence the licensee has executed work of a permanent character and incurred expenses in the execution. The Appellate Court had already held in the representative Suit that the licensee had not executed any work of a permanent character and the provisions of Section 60(a) and (b) of the Indian Easement Act, 1882 were not attracted in their favour. The Corporation therefore, could have at any time revoked these licences. As provided by Section 62 of the Indian Easement Act, a licence is deemed to be revoked in case where it has been granted for a limited period on the expiry of such period. Admittedly, the earlier licences which were given to the petitioners were to be renewed periodically and none of the petitioners possessed any valid licence at the time when impugned notices were given. Their licences had expired and that fact is clearly mentioned in the impugned notices. The petitioners therefore, had absoslutely no right to continue in the places where they were having cabins.

19. By virtue of the provision of Section 231, the Commissioner was, without notice, empowered to remove any such structure like cabin which was erected on the street. Since there was no subsisting licence, it can never be said that the cabin remained on the street with any written permission of the Commissioner. Immediately when the licence ended, the structure became an encroachment and the Commissioner could lawfully remove the same without notice under Section 231. The expression "the Commissioner may without notice, cause to be removed....." has reference only to a notice to quit which is not required as per this provision. Therefore, even without a notice to quit being issued, that is to say - even without any forewarning, the obstruction could be removed from a public street. This power is absolutely necessary because if a public street is encroached upon by placing an obstruction which may require immediate removal it may cause great damage or inconvenience to the public if prompt action is not taken under Section 231. When even a notice to quit is not required to be given by that provision, it follows that there could be no question of giving any show cause notice or hearing to such encroachers. The provisions of Section 231 therefore clearly exclude giving of any show cause notice as to why the encroachment should not be

removed. However, having regard to the fact that even a trespasser should have an opportunity to remove himself, or his belongings on the principle of fairplay, an opportunity is to be given to remove the obstruction, but surely not on the doctrine of audi-alteram partem.

20 The provisions of Section 231 came to be considered in a recent decision of the Hon'ble Supreme Court in Ahmedabad Municipal Corporation Vs. Nawab Khan Gulab Khan ,reported in 1997 (1) G.L.H 438 and that decision is a complete answer to the contention sought to be raised on behalf of the petitioners that they may be given a hearing before removal of the encroachments. The Supreme Court observed that removal of such encroachments requires urgent action and the competent authority must ensure constant vigil on encroachment of the public places. It was observed that no one has a right to encroach the public property and claim the procedure of opportunity of hearing, which would be a tardious and time-consuming process leading to putting a premium for high-handed and unauthorised acts of encroachment and unlawful squatting. In paragraph 8 of the judgement it was held as under:-

"Footpath, street or pavement are public property which are intended to serve the convenience of general public. They are not laid for private purpose frustrates the very object for which they are carved out from portions of public roads. The main reason for laying out pavements is to ensure that the pedestrians are able to go about their daily affairs with a reasonable measure of safety and security. The facility, which has matured into a right of the pedestrians, cannot be set at naught by allowing encroachments to be made on the pavements. The claim of the pavement dwellers to construct huts on the pavement or road is a permanent obstruction to free passage of traffic and pedestrians' safety and security. Therefore, it would be impermissible to permit or to make use of the pavement for private purpose. They should allow passing and re-passing by the pedestrians. No one has a right to make use of a public property for the private purpose without the requisite authorisation from the competent authority. It would, therefore, be but the duty of the competent authority to remove encroachments on the pavement or footpath of the public street obstructing free flow of traffic or passing or re-passing by the pedestrians."

21. It was further observed that if the Corporation allows settlement of encroachers for a long time for reasons best known to them, then necessarily a modicum of reasonable notice for removal, say two weeks or ten days, and its personal service on the encroachers or substituted service by fixing notice on the property is necessary. If the encroachment is not removed within the specified time, the competent authority would be at liberty to have it removed. It was held that this would meet the fairness of procedure and principle of giving opportunity to remove the encroachment voluntarily by the encroachers. The Supreme Court relied upon earlier decisions of the Court in Sadan Singh's case (J.T - 1989 3 SC 553) and Olga Tellis's case (1985) 3 SCC 545. The petitioners cannot press in service the ratio of any decision of the High Court which may run counter to the aforesaid clear proposition of law laid down by the Supreme Court. This Court in ARC Association Vs. Jamnagar Municipal Corporation, reported in 1995 (1) G.L.H at page 586 had, in context of the provisions of Section 231 of the said Act, held that empowering the Commissioner to remove obstruction on the public street cannot be said to be an unreasonable provision and in appropriate cases the Commissioner was empowered to dispense with previous notice to persons who were likely to be affected by the proposed action. As held above, even a notice to quit is not required to be given when there is encroachment on public streets. However, if the encroacher has remained for a long period, then as held by the Supreme Court, the encroacher may be allowed ten-fifteen days' time to remove the encroachment. In the instant case, the impugned notices gave 15 days' time to the petitioners to remove the encroachments and clear the public streets which fall in the Non-Hawking zones. The petitioners have already for a long period thwarted the implementation of the scheme and this group of petition is yet another attempt to do the same. The Hon'ble the Supreme Court has already expressed its displeasure against any orders being passed by the subordinate Courts, which would have the effect of thwarting the final Scheme framed by the Baroda Municipal Corporation, as noted hereinabove.

22. The challenge against the impugned notice on the ground that it does not refer to the provisions of Section 230 or that it does not mention that the petitioners had encroached the public street by placing the cabins or that it was bad on the ground of non-applicability of mind is wholly misconceived. On

perusal of the impugned notice it is clear that the Corporation had in terms stated therein that the licences of the petitioners had come to an end on the dates which are mentioned in the notices, which were in December, 1988 and March, 1989. The notices also referred to the area where the cabins/hand larries were situated. The names of the licensees and the occupants wherever the occupants are different from the original licensees have also been clearly mentioned. It is also stated in each of these notices that the places where the petitioners were having their cabins were in a Non-Hawking zone and in paragraph 7 of these notices, reference is given of such public roads mentioned in the final Scheme, which are declared as Non-Hawking zones. In the Scheme there is a detailed discussion about the reasons as to why these roads are made Non-Hawking zones. It is also mentioned in these notices that the licences had ended and that the amounts of mesne profit should be paid up. There is also reference to additional encroachment in some cases. Merely because there is requirement to pay the mesne profits for the unauthorised user of the place after the revocation of the licence, it cannot be said that any tenancy rights of the petitioners were created. Even the reference to the licensee's sub-letting would not create any tenancy right in favour of the licensee. The notice contains all the material particulars that their licences having been revoked and the place occupied by them being included in the public roads which are declared to be Non-Hawking zones, they were required to remove the encroachments. This power was obviously relatable to the provisions of Section 231 of the said Act and mere non-reference of that statutory provision in the notices can never invalidate them. The entire Scheme pertains to the declaration of Hawking and Non-Hawking zones and clearly refers to various public roads including the roads on which the petitioners' cabins were situated. Mr. Patel's contention that description of these cabins as "shopping centre" on page 6 of the Scheme by the authority preparing the report would entitle these petitioners to the protection which was given to Padmavati Shopping Centre Complex mentioned on the same page, is wholly misconceived. That shopping centre has reference to some building while the area where cabins are described as being a shopping centre is only a general description showing that shopping is being done there and in that context it has been, in fact, observed that it is difficult to walk on those roads and lanes. The cabins of the petitioners were therefore clearly found to be obstructing traffic on the public roads and these roads having been included in the list Annexure-"A" of the Scheme which shows areas declared as Non-Hawking

zones, the petitioners cannot claim any right to continue their cabins on these roads. From the list Annexure-"A" of the Scheme it was pointed out by the learned counsel that the public roads on which the cabins of the petitioners are situated fall at serial Nos. 7, 10, 11, 16, 17 etc. Thus, if the petitioners are allowed to continue with their cabins on these public roads, that would amount to clear violation of the directions of the Hon'ble the Supreme Court approving and directing the implementation of the Scheme and showing its displeasure on any one trying to get interim orders which would thwart the Scheme. Any attempt by such persons to thwart the implementation of the said Scheme would amount to abusing the process of court. The fact that it may be done by filing a suit or a writ petition in the High Court would make no difference. Therefore, the attempt of the petitioners for claiming that the Scheme does not apply to them would only result in thwarting the Scheme, as it can never be the intention of keeping out of its purview the hawkers who are cabin holders and allowing them to create obstructions on the public roads which are included in the Non-Hawking zones. As noted above, it is clear from the provisions of the Scheme that they are intended to cover cabins also. There is reference to cabins not only in the directions of the Hon'ble the Supreme Court but also in the decision of the High Court in Gulam Ali's case (supra) and at various places in the Scheme itself. In the general provisions which are made at page 21 of the Scheme it is stated that the hawkers were given licences for cabins, pitch patharas and stationary hand-carts in the past, but they now constitute an obstruction to free and smooth flow of pedestrians and vehicular traffic and therefore, they are to be removed irrespective of the fact that they are licence holders or non-licence holders. Under the `Modalities', it is significant to note that there is reference to stalls and cabins in clauses 7, 18, 22 and 24 and it was clearly stipulated that no new licence shall be issued for cabins even in the Hawking zones and existing cabin licencees in the Non-Hawking zones are to be shifted first to the Hawking zones. Thus, the petitioners cannot contend that the Scheme will not apply to cabin holders or that the cabin holders cannot be required to shift to Non-Hawking zones. The Scheme as per the direction of Hon'ble the Supreme Court and as approved by a Division Bench of this Court clearly applies also to all these cabin holders who are legitimately required by the Corporation to clear out the public places so that the final Scheme can be implemented.

23. The contention that the word `hawkers' will not include cabin holders can hardly be accepted. There can be hawkers who have four wheeled carts or who squat on the streets and also those who have stalls. This aspect is borne out from the decision of the Hon'ble the Supreme Court in Bombay Hawkers' Union Vs. Bombay Municipal Corportion reported in AIR 1985 S.C. 1206. It was observed by the Hon'ble the Supreme Court in paragraph 2 of the judgement that broadly there are three types of hawkers and that there can be hawkers who have stalls. Even in Gulam Ali's case (supra) this court had included `galla' or `cabin' holders amongst the expression `hawkers' and directed the Hawking and Non-Hawking Zones Scheme to be prepared in that context. Therefore, there is nothing unusual in calling a person who puts up a stall or cabin for selling his goods at a public place, a hawker. The petitioners were hawking their goods which were displayed in their cabins. In this view of the matter and more particularly because even these cabins are the subject matter of the final Scheme which had been approved by Hon'ble the Supreme Court, there is no substance in the contention canvassed on behalf of the petitioners that these petitioners are not hawkers or that the final Scheme was not applicable to them because they were cabin holders and not hand cart holders.

24. The respondent Corporation has placed on record the fact that alternative sites are offered to the petitioners. All these orders under which alternative sites are offered are annexed to the affidavit in reply filed by the respondent Corporation. However, the petitioners have not approved all these alternate sites on the ground that the conditions incorporated in the offer were not acceptable to them and further the place at which they were to be shifted was not desirable. The petitioners have been offered alternate sites in the city itself. The petitioners cannot have a right to claim that they should be placed on a particular road. The petitioners can claim an alternate site only within the provisions of the final Scheme. Hon'ble the Supreme Court has while considering the question of alternate accommodation in Ahmedabad Municipal Corporation Vs. Nawab Gulam Shaikh (supra) held in paragraph 31 of the judgement that it is true that in all cases it may not be necessary as a condition for evicting of the encroacher that he should be provided an alternative accommodation at the expense of the State, which if given is likely to result in abuse of the judicial process. But no absolute principle of universal application could be laid down in this behalf and each case is required to be examined on the given special facts. It was held that: "Normally

the Court may not, as a rule, direct that the encroacher should be provided with an alternative accommodation before ejectment when they encroached public properties, but, as stated earlier, each case requires examination and suitable direction appropriate to the facts requires modulation. Cosidered from this perspective, the apprehensions of the appellant are without force." Thus, the petitioners cannot claim any right to a particular place or to have a particular alternative site. They have been offered the alternative accommodation as detailed by the Corporation in the annexure to their affidavit-in-reply and it is stated on behalf of the Municipal Corporation that even today this offer stands. Any petitioner who may have something to say in connection with such offer can always approach the Corporation, but the petitioners have no right to continue at the place from where they are to be removed under the impugned notices on the ground that they should be first accommodated elsewhere. If the petitioners can shift to the places of allotment that would go a long way in lessening their hardships and will expedite their resettlement. Mere prolonging the litigation with a view to thwart the final Scheme which is framed for the city as is being now done, is a course which is required to be strongly deprecated in view of what the Hon'ble the Supreme Court has stated in SLP No. 5465 of 1989 in the decision rendered on 3.5.89 mentioned hereinabove.

25. It would also be significant to note that a public street as defined in Section 2(52) BPMC Act is a street which was levelled, paved, metalled etc. out of the Municipal or other public fund and which was declared under Section 224 to be a public street. A public street being a street as defined under Section 2(63) includes any road, footway or passage. Under Section 63 (1) (1a) it is an obligatory duty of the Corporation to remove obstructions in or upon streets and other public places. There is therefore, no scope for the Municipal Corporation to lease out any portion of the public street so as to create an obstruction thereon and contravene its own statutory duty. When public streets vest in a Corporation under Section 202 of the Act, they do not change their character and they vest in the Corporation with a view to see that they are duly maintained as public streets. The Commissioner has certain powers in respect of public streets under Section 203 and the only way in which it can cease to be a public street is to close it, as provided by Section 203(2) of the Act, with the sanction of the Corporation. It is only when such public street permanently is closed that the site of such street or of a portion thereof which has been closed can

be disposed of as land vesting in the Corporation, as provided by Section 204. Therefore, there was absolutely no scope of disposing of the public street which was never closed as a public street and the petitioners never acquired any right to continue in the portion thereof which was given to them on purely a temporary licence basis. The fact that they have been able to prolong their occupation is a sad commentary on the inaction of the Municipal Corporation and the apathy of other authorities towards the convenience of the public.

26. The contention that the Municipal Corporation could proceed against the petitioners for eviction only under the provisions of the Gujarat Public Premises (Eviction of Unauthorised Occupants) Act and not under Section 231 is wholly without substance. The provisions of Section 231 are specifically enacted to deal with encroachments on streets and these special provisions would become redundant if this contention is to be accepted. If the legislature intended to take away this power the provisions of Section 231 would also have been repealed along with Section 437A which was deleted. The provisions of Section 231 enabling the Municipal Commissioner to promptly remove the encroachments from the public streets even without any notice to quit is a very special provision to enable the Corporation to effectively discharge its duty under Section 63(1)(19) of the BPMC Act of removing obstructions from the streets and public places. This is not a provision corresponding to any provisions of the Public Premises Act and therefore it was not repealed under Section 19 of the latter Act. This view gains support by the decision of this Court in State Vs. Surabhai 23 G.L.R. 596 rendered in context of the eviction provisions under Section 202 of the Bombay Land Revenue Code and the decision in Gujarat Housing Board Vs. K.B. Parmar 33(1) G.L.R. 79 which was in context of Section 56 of the Gujarat Housing Board Act.

27. As regards the contentions of the petitioners that as per the Circular of 1976 it was the policy of the Government to ensure that the Sindhi refugees who had on partition settled in Gujarat and were occupying places for their trade should not be removed without first offering alternative accommodation to them, it is sufficient to observe that the said Circular does not create any right in favour of such refugees to claim any alternative site or much less a site of choice. No such special treatment can be claimed under such Circular fifty years after the partition. That was only a grace shown to rehabilitate the refugees and the circular

cannot be pressed in service against the exercise of power of Municipal Commissioner under Section 231 to remove obstructions on the streets. In any event, the alternative sites are offered to all the petitioners including those who were refugees and have settled there.

28. The fact that these cabinholders had obtained electricity connection or licences under the Shops and Establishments Act, the purpose underlying which is entirely different, cannot create any right in them to continue in the occupation of the cabins which were now unauthorisedly on the public streets and in respect of which no licence for temporary occupation remained operative since 1988-89.

29. In Special Civil Application No. 4604/97 which was tagged alongwith this group, though no notice was issued therein, the learned Counsel for the petitioner has submitted that the petitioner is having a tea stall in Marimata lane and there are several Government offices and hospitals to whom the petitioner caters tea and if he is not allowed to remain in that lane, they would suffer. This petitioner also has clearly no right to continue his tea stall in the place which admittedly is in a Non-Hawking zone, and, has not made out any case which would entitle him to continue to vend tea at the place in question.

30 For the aforesaid reasons it is not possible to accept any of the contentions raised on behalf of the petitioners by the learned Counsel in all these petitions. All these petitions are therefore, rejected. Notice is discharged in each of them with no order as to costs. Special Civil Application No. 4604/97 is also summarily rejected.

31. The learned Counsel for the petitioners have submitted that the petitioners desire to approach the appellate forum against this decision and furthermore there is monsoon season going on and therefore, operation of this order may be stayed for some days to enable the petitioners to approach the appellate forum. The matter has been sufficiently prolonged and any further prolongation would be contrary to the final scheme which is approved by the apex Court and in respect of which it has been observed that there should not be proceedings which thwart the scheme. Any further interim relief would run contrary to the directions of the Supreme Court and therefore, it cannot be granted. The Deputy Commissioner for the Municipal Corporation and other

officers who are present are however, agreeable for giving the petitioners one week's time to remove their cabins and clear out. It is also stated that the Corporation will help them in shifting from the present place. Accordingly the petitioners will have one week's time to remove the encroachments.

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*Mohandas/pkn